

# Texas Environmental Public Participation Guide

The University of Texas Law School Environmental Clinic



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Note: as the statutes and regulations regarding public participation at TCEQ change, we will attempt to make updates to the electronic version of this guide. Should you want an updated version or see information/links that need updating, please contact:

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## Introduction

Decisions by Texas' primary environmental agency, the Texas Commission on Environmental Quality (TCEQ), and by the U.S. Environmental Protection Agency (EPA) directly impact health and safety and air and water quality in Texas communities. This guide explains how you can participate in TCEQ and EPA permitting, enforcement, and rulemaking decisions in order to better protect your community.

### How can you use this guide?

- To help find online information about sources of pollution in your area
- To learn how to participate in and challenge TCEQ environmental permitting decisions
- To understand how to participate in state and federal environmental enforcement actions
- To help you advocate for changes to existing environmental laws and regulations

### Permitting

State and federal laws generally prohibit companies and individuals from releasing pollution into the air, water, or onto land unless the release is first authorized by a permit. Common permits include air, wastewater, and waste permits, all of which are issued in Texas by the TCEQ. These permits are supposed to limit pollution so as to ensure protection of public health and safety and conservation of natural resources and habitats.



If you or your neighbors are concerned about a new or expanding source of pollution in your community or want to make sure that a source complies with all environmental requirements, you should consider participating in the permitting process. Such participation can range from simply filing written comments on a draft permit or raising your concerns at a public meeting to participating in a trial-like contested case hearing.

### Enforcement

In addition to issuing permits, TCEQ and EPA are responsible for enforcing permits and state and federal environmental laws. When individuals or companies violate the terms and conditions of their permits or violate other environmental laws, EPA and TCEQ may investigate the violation and take legal enforcement action against the violator. Such enforcement actions may result in money penalties or require corrective action, such as reducing pollution releases.

The public can participate in the environmental enforcement process by documenting environmental violations, filing complaints with the TCEQ and EPA, and, in some cases,

commenting on TCEQ or EPA enforcement actions. In addition, individuals can bring their own environmental enforcement actions for violations of certain federal statutes, regulations, and permits. Your local government also has authority to enforce many state and federal pollution laws. If a pollution source near you is violating its permits or is otherwise causing pollution that creates a threat to public health or safety, you should consider participating in the environmental enforcement process.

## **Rulemaking**

The Texas Legislature passes many laws that affect the environment and the environmental public participation process. You can affect those laws by contacting your State Senator and Representative and urging them to vote for strong environmental protections.

In addition, the TCEQ adopts its own rules to fill in the details of the state environmental laws. You can participate in TCEQ's rule development process by signing up for advisory groups and committees, letting your friends and neighbors know about rulemaking actions that may impact them, filing a rulemaking petition to ask TCEQ to adopt certain rules, or filing comments on draft TCEQ rule proposals. In addition, you can challenge an inadequate TCEQ rule in state court. Similarly, you can participate in EPA's process for adopting federal rules affecting the environment.

You should consider participating in the rulemaking process if you believe existing environmental rules are inadequate, have ideas for improving the environmental regulatory system, or want to ensure that environmental laws are not weakened.

## **When to Seek Additional Assistance**

This guide is designed to answer basic questions about participating in government permitting, enforcement, and rule-making actions. State and federal agency processes and environmental law are complicated and there may be times when it's necessary to consult with an attorney or a technical expert. Please note that in 2015, the Texas Legislature changed many of the rules related to public participation at TCEQ. This guide reflects the current rules, but older rules may apply to permit applications filed before September 1, 2015.

If you are confused about the TCEQ's permitting, enforcement, or rulemaking process, you can contact TCEQ's Office of Public Interest Counsel (OPIC). OPIC attorneys represent the public interest in TCEQ matters by participating in contested case hearings and assisting people who are affected by an agency action who do not have an attorney. OPIC attorneys cannot represent individual citizens, but the attorneys can help by answering questions about TCEQ legal and hearing processes, enforcement actions, and rules. OPIC can be reached at 512-239-6363. You can also contact TCEQ's public education program at 800-687-4040.

# Chapter One

## Public Participation in Environmental Permitting

Federal and state environmental laws require companies or individuals to obtain a permit if they want to dispose of wastes or discharge pollutants into the air or water. In Texas, most of these permits are issued by the Texas Commission on Environmental Quality (TCEQ).

Before a company can build a new facility that will release pollution or make certain changes to an existing polluting facility, the company must obtain a permit from TCEQ.<sup>1</sup> You can affect decisions regarding whether a new facility can be built, how a facility is allowed to operate, what kind of monitoring the facility must conduct, and how much pollution a facility can release by participating in the state environmental permitting process.

Although it is rare that TCEQ denies a permit, public participation in the permitting process often results in tighter pollution limits, better controls, and more effective monitoring. If you are concerned about how a new or expanding source of pollution may impact your property or community, you should consider participating in the permitting process.

The sections below first describe the general steps in the TCEQ permitting process and then describe how you can participate in that process. For additional information about participation in permitting, you can visit TCEQ's web page at: <https://www.tceq.texas.gov/agency/working-with-us/permitting-participation/public-participation-9-1-2015/>.

### Permitting Process Overview

TCEQ issues many types of permits, including: air permits, wastewater discharge permits, and solid waste disposal permits. While the TCEQ permitting processes differ by permit type, there are some general public participation requirements that apply to most permits. These general requirements are described below.

Note, that while this section describes the public participation process applicable to many permits, some TCEQ permitting actions do not require any public participation or require only some limited form of public participation. Other permitting actions require public participation only when the TCEQ's Executive Director determines there is significant public interest in the permit. It is therefore important to confirm the public participation provisions that apply to the specific permit in which you are interested. TCEQ's Office of Public Interest Counsel can help clarify available public participation opportunities.

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<sup>1</sup> While TCEQ issues most environmental permits in Texas, some permits are issued by the Texas Railroad Commission (e.g. certain permits related to oil and gas or coal mining) or federal agencies such as the U.S. Army Corps of Engineers (e.g. dredge and fill permit) or U.S. Fish and Wildlife Service (e.g. permits relating to endangered species).

## What are general permits, standard permits and permits by rule?

These permits are not customized to details of any particular facility. They are generic to: (1) certain classes of facilities, such as rock crushers and pipeline compressor stations, (2) to certain types of equipment, such as storage tanks, or (3) to certain types of activities, such as maintenance activities. If a source plans to meet the applicability requirements, it can opt to meet the pollution limits outlined in the generic permit rather than applying for an individual, site-specific permit. If a source seeks to operate under a general permit, permit by rule, or standard permit, it normally (there are exceptions) simply notifies TCEQ and does not have to meet public participation requirements.

Generic permits are adopted, renewed, and amended following procedures similar to the rulemakings described in Chapter 3.

### Steps in the TCEQ Permitting Process

For those permitting actions that do allow for public participation, the normal permitting process can be broken down into five steps:

#### Step 1: Notice of Receipt of Application and Initial Comment Period

The permitting process normally begins when a company or individual files an application for a permit. The application may be for a new permit or for a change to an existing permit. TCEQ reviews the application to see if it is administratively complete, meaning the application contains all of the parts required by law. If it is not administratively complete, the agency requests additional information from the permit applicant.

Once TCEQ determines an application is administratively complete, TCEQ issues a Notice of Receipt of Application and Intent to Obtain Permit (NORI), which describes the location and nature of the proposed activity, lists contacts at the agency and for the applicant, and identifies where the public may view and copy the application. It also explains how to submit comments on the application, get on a mailing list, request a public meeting, and request a trial-like “contested case” hearing.

Generally, the applicant must publish the NORI in a newspaper of general circulation in the city or county nearest the permitted site. If the elementary or middle school closest to the site has a bilingual education program, the notice must also be published in a local newspaper published

in the language of the bilingual program. Additionally, TCEQ's Chief Clerk must post all public notices on the internet.

TCEQ's Chief Clerk generally mails NORIs to:

- The state senator and representative for the area where facility seeking the permit is located;
- Parties on the agency's mailing list;
- Landowners named on certain application maps;
- The mayor and county judge for the area where the facility will be located;
- Local health authorities;
- Other specified state and federal agencies; and
- Parties who have already filed public comments or requested a hearing.

For certain air permits, TCEQ requires the applicant to post signs around the facility property to provide notice instead of requiring mailed notice.

For many permits, the NORI publication commences the initial public comment period. During this comment period, you can file comments identifying issues you are concerned about regarding the facility or application. For some permits, you can also request a public meeting or contested case hearing. For most air permits, you will lose the opportunity to request a contested case hearing later in the process if you do not file comments during this first comment period and specifically request a contested case hearing. Note that at this point in the process, you will be commenting on the application materials only as the agency will not yet have drafted a permit.

### **Step 2: Technical Review**

After an application is declared administratively complete, TCEQ begins its technical review of the application. This process usually involves negotiation – often via email – between the agency and the company about the limits and requirements to be included in any draft permit. At the end of the technical review, TCEQ will either issue a draft permit or recommend denial of the application.

### **Step 3: Notice of Application and Preliminary Decision and Second Comment Period**

A draft permit is issued after the TCEQ has completed a technical review of an application. TCEQ generally mails notice to people on the notice list; posts notice on its website; and authorizes the applicant to publish a second public notice in the newspaper. The Notice of Application and Preliminary Decision (NAPD) includes the TCEQ's preliminary decision about whether to issue a draft permit, states the proposed permit limits, and generally triggers the start of a second public comment period. For many permits (although not all), this comment period provides an opportunity to request a public meeting, contested case hearing, or both. At this stage in the process, you will be able to review and submit comments on the actual draft permit.

#### **Step 4: Final Decision to Issue or Deny Permit**

The decision to grant or deny a permit can be made by either the TCEQ Executive Director or the TCEQ Commissioners.

##### **A. Decision by Executive Director**

TCEQ's Executive Director is authorized to grant a permit only if the Executive Director determines that: (1) public notice requirements have been satisfied and the Executive Director has responded to all timely filed public comments; (2) the application meets all statutory and administrative criteria; (3) the application raises no new issue requiring interpretation of commission policy; (4) the Executive Director's staff and the Office of Public Interest Counsel (OPIC) do not raise objections; and (5) the application is uncontested, such that there are no pending requests for rehearing or for a contested case hearing, any prior requests have been withdrawn or denied, and/or all issues have been settled.

In addition, the Executive Director can act on an application for an air permit amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

Once the Executive Director makes a final decision on a permit, the Chief Clerk's office will mail a "decision letter" to the applicant, any person who submitted comments or a request for hearing, any party on the mailing list, and OPIC. This letter includes the Executive Director's response to comments; the decision to issue or deny the permit; and instructions on how to contest the decision. Generally, you can challenge the Executive Director's decision by: (1) filing a request for a contested case hearing, (2) filing a request for reconsideration, or (3) filing a motion to overturn.

##### **B. Decision by the Commissioners**

If a permit application does not meet the criteria for action by the Executive Director, then the application is referred to the Chief Clerk and is scheduled for action by the TCEQ Commissioners. The TCEQ has three Commissioners, all appointed by the Governor of Texas. The applicant, Executive Director, OPIC, and all persons who commented or requested a contested case hearing or rehearing will receive mailed notice of the commissioners' meeting.

At the Commissioners' meeting, if there is no request for a contested case hearing (or if the Commissioners deny all contested case hearing requests), then the Commission may take final action to issue or deny the permit.

If there is a request for a contested case hearing and the Commission grants that request, the application is referred to the State Office of Administrative Hearings (SOAH). SOAH is a separate state agency that conducts independent hearings for other state agencies. When the commission refers a matter to SOAH, it will set a date by which the SOAH judge(s) are expected

to issue a proposal for decision on the permit. The Commission may also limit the scope of issues that can be raised during the contested case hearing.

The contested case hearing process is described in more detail below. After the hearing, the SOAH judge(s) makes a recommendation as to whether the permit should be issued or denied, either as is or with changes. The SOAH judges' recommendations are then sent to the TCEQ Commissioners, who make the final decision regarding whether to issue the permit. The TCEQ Commissioners are not required to follow the SOAH judges' recommendations.

Once the Commission acts to issue or deny a permit, a decision letter, including notice of the action and information regarding filing a motion for Rehearing, are sent to the applicant, Executive Director, OPIC, and anyone who timely filed a public comment, request for reconsideration, or contested case hearing.

### **Step 5: Challenging TCEQ's Permitting Decision**

Procedures for challenging a permitting decision vary depending on the type of permit and whether the decision was made by the Executive Director or the TCEQ Commissioners. These administrative procedures must generally be followed before you can challenge a TCEQ permitting decision in court. In some cases, if you choose to challenge a TCEQ decision in state district court, that lawsuit must be filed while your administrative challenge is still pending.

#### **A. Administrative Procedures to Challenge the Executive Director's Decision**

If the Executive Director decides to issue a permit, you have a few ways to challenge this decision.

##### ***i. Request for Contested Case Hearing***

For many types of new permits and certain amendments to existing permits you can request a contested case hearing within 30 days of the date of the Executive Director's decision letter. The main exception is for certain air permits for which you must request a contested case hearing during the comment period following the NORI. However, your request for a contested case hearing will be valid only if it is based on comments you made on the permit application during the public comment period. Therefore, it is of the utmost importance that you make comments during the public comment period and that these comments are as detailed and comprehensive as possible.

##### ***ii. Request for Reconsideration***

After the Executive Director mails a decision letter, any person can file a request for reconsideration asking the TCEQ Commissioners to reconsider the Executive Director's decision. The request for reconsideration must be filed no later than 30 days after the date of the decision letter, and must include your name, address, phone number, and an explanation of why you believe the decision should be reconsidered.

### **iii. Motion to Overturn**

If no request for a contested case hearing or reconsideration is filed and the executive director issues the permit, any person can file a motion to overturn the Executive Director's decision within 23 days after the mailing date of the notice of signed permit. Your motion should explain why the TCEQ Commissioners should review and overturn the Executive Director's decision. If the Commission does not act on the motion to overturn within 45 days of the mailing date, the request is denied, unless TCEQ has extended the 45-day window.

## **B. Procedures to Challenge a TCEQ Commission Decision**

If the TCEQ Commissioners grant a permit request, you can file a motion for rehearing asking them to reconsider their decision. The motion for rehearing may address issues referred to SOAH by the Commissioners; issues added by the judges at SOAH as part of the contested case hearing; issues the Commissioners declined to refer to SOAH for a hearing; or issues regarding the Commission's decision on an application.

The motion for rehearing must be submitted within 25 days after the Commission's decision is signed. If the Commissioners do not act on the motion within 55 days after the decision was signed, the motion is overruled by operation of law. In the absence of a timely motion for rehearing, a decision or order of the commission is final on the expiration of the period for filing a motion for Rehearing. If a party files a motion for rehearing, a decision or order of the commission is final and appealable on the date of the order overruling the motion or on the date the motion is overruled by operation of law. A motion for rehearing must be filed before you can challenge in court a TCEQ commission decision to grant a permit request.

## **C. Appeal to Travis County District Court**

Finally, if you believe a permit issued by the Commission does not meet all of the legal requirements, you can file suit in Travis County District Court seeking judicial review of the agency's final action. You must file the petition with the Travis County District Court no later than 30 days after the effective date of the commissioners' decision. If you think you may want to challenge a permit decision in court, you will likely want to consult with an attorney as early as possible in the permitting process. NOTE: you may have to file an appeal in court before the TCEQ denies your motion to overturn. Legislation has been introduced in the 2017 Texas Legislative session to address this peculiarity, but the prospects for that legislation are, of course, unknown.

## **How to Participate in the Permitting Process**

### **Make sure you get notice of permitting actions**

In order to participate in the permitting process, you need to know if a facility in your area is seeking a permit. Notice of TCEQ permitting actions is generally published in the newspaper,

sent by mail to persons on the TCEQ mailing list, posted on the fence of certain facility sites, and/or posted on TCEQ's website. The best way to ensure that you do not miss a public notice is to ask TCEQ to put you on the mailing list to receive public notices for permitting actions in your county. It is important to note that the mailed notice does not explicitly identify the beginning or end date for the public comment period. The mailed notice states the number of days that the comment period is open and that the notice period begins on the publication date of notice in the newspaper. Therefore, to determine the deadline for filing your comments, you will need to determine when notice was published in the newspaper.

### How do I get on a mailing list?

If you submit a comment, request a public meeting, or request a contested case hearing on an application, you will be added to the mailing list for that application.

In addition, you can send a written request to the TCEQ Chief Clerk, including your complete name and address, asking to be placed on a mailing list. (Office of the Chief Clerk, MC 105, TCEQ, PO Box 13087, Austin, TX 78711-3087).

There are two types of mailing lists that you can ask to be placed on: (1) the permanent mailing list for a specific applicant and permit number, or (2) the permanent mailing list for a specific county (which includes all air, water and waste notices for that county). Note that if you are interested in a particular facility, you will need to ask to be placed on the mailing list for all of that facility's permits, and there may be many of them.

In addition to getting on a mailing list, TCEQ has an online searchable public notice database, for public notices published on or after December 17, 2004. This database is located at [https://www.tceq.texas.gov/agency/cc/pub\\_notice.html](https://www.tceq.texas.gov/agency/cc/pub_notice.html). For public notices published between January 1, 1995 and December 17, 2004, only basic information is provided online.

As noted above, publication in the newspaper of the first notice (the "NORI") generally triggers the start of a comment period, during which you can file written comments, request a public meeting, and or request a contested case hearing. The notice will identify the length of the public comment period and whether there is the opportunity to request a public meeting and/or contested case. As a general rule, the first comment period runs for 30 days following the publication of public notice. However, if a public meeting is held on the application after the close of the public comment period, the comment period will generally be extended to allow for the submission of oral and written comments offered at the public meeting. There are,

however, numerous exceptions to the general rule. If you are uncertain about the public participation opportunities for a particular permit application, contact OPIC or the TCEQ Public Education Program.

### **Review Application and Files**

Once you've received notice about a pending permit application, you have to decide whether or not to participate in the permitting process. To do this, you will want to review the permitting files. TCEQ is required to provide the public with a copy of the completed permit application for review at a public place within the county where the facility will be located. This location should be identified in the public notice and is usually a local library. In addition, permitting files will be available at the TCEQ's Austin office and, in some cases, at the TCEQ regional office. In order to view a directory of all of the TCEQ regional offices, visit the following link, [http://www.tceq.texas.gov/about/directory/maps\\_index.html](http://www.tceq.texas.gov/about/directory/maps_index.html).

The permitting file should include: all of the application materials, TCEQ's summary of the application, identification of the TCEQ engineer assigned to the application, and correspondence between the TCEQ and the party requesting the permit. The file may provide insights into aspects of the permit that the TCEQ's permitting engineer is concerned about. The permitting file is often kept in the Austin office of the TCEQ engineer drafting the permit, so it is a good idea to call the file room and ask that the current permitting file be made available before visiting the file room. It is often easier and more efficient to convince the TCEQ to address your concerns before the agency issues a draft permit. If you are concerned about a particular facility, it is a good idea to contact the permitting engineer assigned to that facility and express your concerns to him or her early in the process.

### **File Comments**

If you want to affect a TCEQ permitting decision, you should file written comments. Your comments should raise all potentially relevant factual and legal issues. To assist you in identifying relevant issues, the charts included in the Attachment to this Guide summarize the legal and factual issues identified by Texas statutes and the Texas Administrative Code as relevant to different permitting actions.

Your odds of securing a more protective permit or, even, of securing an application denial are much greater if you can work with a technical expert to identify technical problems with the permit application.

It's better to be over-inclusive, rather than under-inclusive, when drafting comments. The TCEQ is only required to respond to comments filed during the public comment period. In addition, should you decide to request a contested case hearing, the issues in the hearing will be limited to those that you raised in public comments.

Public comments can be made by mail, in person, or online. Faxed comments must be accompanied by mailed comments within three days.

Addresses for Public Comment	
Comment by Mail:	Office of the Chief Clerk, MC 105 TCEQ PO Box 13087 Austin, TX 78711-3087
Comment by Hand Delivery:	Office of the Chief Clerk TCEQ 12100 Park 35 Circle, Bldg F Austin, TX 78753
Comment by Fax:	(512) 239-3311
Comment Online:	<a href="http://www.tceq.texas.gov/about/comments.html">http://www.tceq.texas.gov/about/comments.html</a>

### Request a public meeting

TCEQ may hold a public meeting during the technical review of an application to inform the public about the application and take comments. Public meetings are intended to allow the public to ask questions of the applicant and TCEQ and to offer oral public comments.

For some permits, TCEQ is required to hold a public meeting if one is requested by any person. However, for many permits, requests for public meetings will be granted only if: (1) the TCEQ Executive Director determines there is “significant interest” in the permit application or (2) the request for public meeting is made by a legislator or other elected official. If you would like a public meeting, it is therefore useful to coordinate with neighbors to ensure that a significant number of people request the meeting. You can also call your state legislator and ask that he or she request a public meeting.

Public meetings are generally divided into two parts. The first part provides the public with a chance to ask questions of the applicant and TCEQ. The second part gives the public the opportunity to offer formal comments that will be included in the legal record maintained for that particular permit application. Only comments made during the second part of the meeting go into the record and require an official written response from TCEQ. Thus, if you attend a public meeting, be sure to make any comments that you want included in the official record during the second, formal portion of the meeting. It is best if you submit any detailed comments in writing at the meeting or within the comment period, although oral comments made at a public meeting can still be very important as discussed below.

Public meetings are an optional part of the process, and you will not waive future rights by not requesting a public meeting, as long as you file written comments by the comment deadline. However, public meetings can be useful as a way to get the applicant or the TCEQ to answer

specific questions, raise public awareness about the permit application, and increase media attention. If you request a public meeting, the public comment deadline will generally extend until the close of the public meeting.

TCEQ maintains an online calendar of public meetings and hearings on permitting cases at <https://www.tceq.texas.gov/agency/hearings/calendar.html>.

### Request a Contested Case Hearing

A contested case hearing is a legal proceeding similar to a civil trial before a judge. The hearings are conducted at the State Office of Administrative Hearings (SOAH), which is an independent agency that holds hearings for numerous state agencies. These types of hearings can be complex, legalistic, and expensive, and it can be very beneficial to seek legal assistance. Nevertheless, members of the public with no legal or technical training have participated effectively on their own, or with procedural guidance from TCEQ's Office of Public Interest Counsel (OPIC).

Contested case hearings are valuable because they provide an opportunity to question the permit applicant's experts (the engineers, modelers, and others who helped draft the permit application) and to obtain additional information from the applicant. Hearings also allow you to call your own expert witnesses to explain why you believe the permit application should be denied or the draft permit changed. At the hearing, it is presumed that the draft permit meets all legal and technical requirements and that it adequately protects human health and safety, the environment, and physical property. The person challenging the permit bears the burden to produce evidence that demonstrates that the draft permit violates a specifically applicable state or federal legal requirement.

At the end of the hearing, the SOAH Administrative Law Judge (ALJ) drafts a Proposal for Decision (PFD), which is submitted as a recommendation to the TCEQ Commissioners. The PFD recommends whether the draft permit should be granted, denied, or granted subject to certain changes. It also includes a list of determinations regarding the facts and law applicable to the permit. It is important to remember, however, that the TCEQ Commissioners do not have to follow the ALJs' recommendations.

### How to file a contested case hearing request

For many types of new permits, as long as you filed comments during the comment period, you can request a contested case hearing within 30 days after the date of the TCEQ's decision letter issuing the permit. The request must be based on issues that you raised during the comment period. For certain air permits a contested case hearing must be requested by an affected person by the close of the first comment period following the NORI. For some other new permits and many types of permit changes, there is no contested case hearing opportunity.

If you want to request a contested case hearing, you can include your request as part of your public comments.

A request for a contested case hearing must include:

- The requestor’s name, physical address, and daytime phone number;
- The permit number and permit applicant’s name (or facility name);
- A statement clearly requesting a contested case hearing;
- The location of the requestor’s home, business or property that is affected and its distance from the proposed facility;
- A detailed explanation of how the requestor qualifies as an “affected person” (i.e. the requestor would be negatively impacted by the proposed facility or activity in a manner that is distinct from the facility’s effect on the general public), including the uses of property that may be impacted by the proposed permit;
- Any relevant factual evidence, such as the information in the application, photos, complaint logs, videos, or expert affidavits; and
- A list of the disputed factual issues that the requestor would like to raise as part of a contested case hearing.

In any request for a contested case hearing, the requestor must demonstrate that he or she is an “affected person.” An affected person is “one who has a personal, justiciable interest related to a right, duty, privilege, power, or economic interest affected by the application.”<sup>2</sup> A person whose health, safety, or use and enjoyment of property may be adversely affected by a permitting decision should qualify as an affected person, whereas having an interest shared by the general public is not enough to qualify as an affected person. For example, someone who lives near a refinery and regularly sees and smells its air emissions should qualify as an affected person for purposes of challenging a refinery expansion permit that would increase the facility’s air emissions. A person who does not live near the refinery but has a general concern for air quality likely would not qualify.

<b>Questions TCEQ Asks in Determining if Requestor is an “Affected Person”</b>
Is the claimed interest protected by law? What are the distance restrictions or other limitations in the law on the affected interest?
Is there a relationship between the claimed interest and proposed activity of the permit applicant?
Is there a likely impact on the health, safety, and use of property of the person claiming an interest by the proposed activity of the permit applicant?
Is there is a likely impact on the affected person’s use of a natural resource by the proposed activity of the permit applicant?

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<sup>2</sup> 30 Tex. Admin. Code 55.256.

If a governmental entity requests a contested case hearing, TCEQ will consider whether the Legislature has given the entity the legal authority over, or interest in, the issues related to the permit application. For example, a city clearly has an interest in the water quality of a river running through a city park. However, a town 50 miles from a proposed waste disposal facility may have a difficult time gaining status as an affected person. State agencies, except river authorities, cannot request a contested case hearing or qualify as an affected person.

If an organization or group requests a contested case hearing, the request must identify one or more members of the group who are personally “affected persons”, include the members’ names and physical addresses, and explain how the group’s purpose is related to the interest it is trying to protect through the permit challenge. For example, if a draft permit would allow waste discharges from an industrial plant to enter a nearby lake, a local fishing organization might seek to have tighter restrictions imposed on the permit applicant’s discharge. The organization would need to demonstrate that at least one (and ideally several) of its members qualify as individually-affected persons<sup>3</sup>, list those persons’ names and their addresses in the contested case hearing request, and explain that the purpose of the organization includes protecting local aquatic environments in order to preserve fishing opportunities for its members.

The TCEQ Commissioners will decide whether to grant any request for a contested case hearing. The Chief Clerk will set the hearing request for a TCEQ Commissioner’s agenda meeting and will mail notice of the meeting to the hearing requestor, the applicant, the Executive Director and OPIC. At any time up to 23 days before the commission meeting, the TCEQ Executive Director, OPIC, or the applicant can file a written response to any contested case hearing requests. The hearing requestor can then file a written reply to any responses up to nine days before the commission meeting.

In deciding whether to grant a request, the Commissioners will consider: the merits of the application and supporting information in the record, the executive director’s analysis and opinions, and any other expert reports, affidavits, opinions, or data submitted by the executive director, applicant or hearing requestor. So if you can secure an affidavit or report from an expert, you should attach that to your hearing request. Hearing requestors are not normally allowed to make oral comments at the commission meeting, unless requested by the Commissioners. The Commissioners may, however, ask questions of the requestor(s), applicant(s), and or TCEQ staff.

If the commission denies your request for a contested case hearing, you may submit a motion for rehearing asking the commissioners to review its decision. You can also appeal the denial to the Travis County District Court. You must file a motion for rehearing to be entitled to appeal to district court.

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<sup>3</sup> For example, stating in the hearing request that Bill Jones and Sherry Black, who are members of the organization, fish in the lake once a week may be enough to show that the organization has individually-affected members. If Bill Jones and Sherry Black also own land with lake-frontage, the TCEQ might be more likely to recognize them as individually-affected members.

If your request for a contested case hearing is granted, the case will be referred to SOAH with a list of issues to be considered at the hearing. The Commission can also refer the application for alternative dispute resolution prior to the SOAH hearing to determine if a settlement is possible.

## **How to participate in a contested case hearing**

A contested case hearing is a formal legal proceeding. Before the proceeding, each party gets to “discover” relevant information and documents of the other parties. In order for the judges to consider specific facts, those facts must be presented as evidence through sworn testimony or authenticated documents, as provided in the Texas Rules of Evidence. The entire contested case hearing process is statutorily limited to 180 days. However, the Administrative Law Judges are allowed to grant extensions and the contested case hearing process has frequently taken six months to a year.

In a contested case hearing, it is presumed that the draft permit meets all state and federal legal and technical requirements and would protect human health and safety, the environment, and physical property. Parties challenging a permit can rebut those presumptions by presenting evidence to show that the draft permit violates applicable state or federal legal requirements.

The timing and conduct of a contested case hearing will be determined by the ALJs, but hearings generally follow the steps listed below.

### **Step One: Preliminary Hearing**

If TCEQ refers a permit application to SOAH, the process generally begins with a preliminary hearing. At the preliminary hearing, the ALJ names the parties to the hearing, issues an order setting the discovery and procedural schedule for the case, and gives the parties an opportunity to discuss settlement.

At this hearing, the ALJ has the authority to designate as parties to the case persons whose hearing requests were initially denied by the TCEQ (as long as those persons filed comments). To be designated as a party, you or your representative must appear at the preliminary hearing. You will generally be expected to attend so you can explain how you are affected by the application in a way that is different from the general public. Other parties will normally include the TCEQ Executive Director, the Office of Public Interest Counsel (OPIC), and the applicant. The ALJ may align some of the parties and require them to select one person to be their representative during the hearing.

### **Step Two: Discovery**

The ALJ’s initial order will likely set out a discovery schedule. Discovery is the formal process by which parties to a contested case hearing exchange information and documents relevant to the

challenged permit. The rules of discovery allow a party to ask questions about most topics, as long as the questions are reasonably calculated to lead to admissible evidence related to the permit. You can also ask for documents reviewed or relied on in preparing the application or selecting the location for the proposed facility; or relating to the applicant, owner, or operator of the facility.

Parties do not have to respond to requests that ask for information that falls under a “privilege” (such as the attorney-client privilege, which protects certain communications between a client and attorney). Parties can also raise certain objections to discovery requests, such as irrelevance, unavailability, or that the request is overly burdensome.

Discovery in contested case hearings generally follows the Texas Rules of Civil Procedure, which include more details about types of discovery, objections and privileges. You can find the rules at <http://www.txcourts.gov/rules-forms/rules-standards.aspx>. There are, however, some TCEQ specific discovery rules that are different from those in the Texas rules.

Below is a summary of the ways you can ask for information during discovery:

**Requests for Disclosure:** These are generic requests for discoverable information, such as: the names of the parties, the legal theories and factual basis for the parties’ claims or defenses, the names of persons having knowledge of relevant facts, and the names of testifying experts. Copies of related documents are usually produced with the response and a party generally cannot object to responding to a request for disclosure.

**Requests for Admission:** These are yes-or-no questions designed to get a party to admit certain facts or acknowledge the relevance of certain laws. Unless the judge directs otherwise, each party is allowed to request 25 admissions. Requests for admissions are generally used to establish that certain documents are authentic or that certain simple facts are true.

**Interrogatories:** These are questions you send to the opposing party. Unless the judge sets a different limit, you are allowed to ask the opposing party 25 questions.

**Request for Production & Inspection:** These are requests for documents, records, and other tangible items.

**Depositions:** These are formal, in-person, question-and-answer sessions. Depositions provide an opportunity for a party to question the opposing party or the party’s witnesses while they are under oath. In general, the total time per party for oral depositions cannot exceed 50 hours. However, a judge may set lower limits at his or her discretion. If a party uses more than two expert witnesses, the opposing party is allowed 6 additional hours of total deposition time for each additional designated expert.

**Expert's Report:** This is a written report produced by a party's expert witness. It includes the expert's observations, tests, calculations and opinions. The scheduling order will normally identify a deadline for filing your experts' reports, if expert reports are to be required.

**Request for Entry on Land:** This is used to inspect real property.

Parties must generally respond to discovery requests within 30 days or by the deadlines established by the ALJ. Discovery documents are not usually filed with SOAH, they are just exchanged among the parties, so it is important to keep good records of when you send and receive discovery requests.

### Step Three: Pre-Filed Testimony

The ALJ will normally require the parties to pre-file the direct testimony of their witnesses, including expert witnesses, and exhibits. Expert witnesses in a contested case hearing are hired to review the application and draft permit and offer their expert opinions as to whether or not it meets legal and scientific requirements. Examples of experts include engineers, air or water modelers, and toxicologists. The experts' pre-filed testimony and exhibits, together with other testimony, exhibits, and closing arguments from the hearing, will form a base of evidence that the ALJ will consider in making a determination on the permit application.

Pre-filed testimony is a written transcript of a witness's testimony in question and answer format. Usually, parties are required to give the pre-filed testimony of their witnesses to TCEQ (both the Executive Director and OPIC), opposing parties, and the judge prior to the hearing on the merits.

Exhibits may be written documents, maps, photos, etc. There are fairly detailed rules about how to offer exhibits. For example, some judges require that you obtain certified copies of any government documents.

Opposing parties then have an opportunity to raise certain objections to the pre-filed testimony and exhibits. If you do not raise any objections to the testimony and exhibits during the contested case hearing, you are usually prohibited from raising them in any later appeal.

### Step Four: Hearings on the Merits

At the hearing on the merits, the ALJ will often begin by ruling on the objections raised by parties to the pre-filed testimony or exhibits. The ALJ will then normally call the first witness. When a party's witness is called, the witness goes to the stand, is asked to look at his or her pre-filed testimony and is asked to state whether the written testimony reflects the testimony

they intend to give to the court. If the witness has corrections to the written testimony, the witness may make those at that time. The opposing parties are then given the opportunity to question the witness in “cross-examination.” After the other parties have questioned the witness, the party who offered the witness has an opportunity to ask rebuttal questions. Rebuttal questions are limited to the subject matter covered in the opposing parties’ cross-examination questions.

### **Step Five: Closing Arguments**

At the end of the hearing, the ALJ usually requires written briefs instead of oral closing arguments, but the parties can request oral argument. The ALJ will set deadlines for closing briefs and for replies to the opposing party’s closing brief.

### **Step Six: Proposal for Decision and Exceptions**

After closing arguments, the ALJ issues a Proposal for Decision (PFD). The PFD is due by the deadline set by TCEQ Commissioners. The judge sends a copy of the PFD to each party in the contested case. Parties generally have 20 days to file exceptions if they are unhappy with the PFD. Parties can usually also file any objections to other parties’ exceptions within 30 days of the issuance of the proposal for decision.

### **Step Seven: Commissioners Action on Application**

At a TCEQ Agenda meeting, an open meeting where the Commissioners will issue orders and make decisions on a variety of issues, the TCEQ commissioners decide whether to accept, reject, or modify the ALJ’s PFD. Because the PFD is simply the ALJ’s recommendation on how to handle the permit, the Commissioners are not required to accept the PFD.

All parties to the contested case hearing are notified of the Agenda meeting. At the Agenda meeting, the ALJ introduces the issue raised in the hearing and presents his or her recommendations to the Commission. Normally, the lawyer for the Executive Director will explain the ED’s position, and each other party has a chance to deliver a brief, 5-minute presentation to the Commission. The Commissioners may ask the parties questions. Finally, the Commissioners decide to adopt, modify or reject the judge’s recommendation, in whole or in part.

### **Step Eight: Appealing TCEQ’s Decision**

After the parties are notified of the Commissioners’ final decision, a party who wants to appeal the decision has 25 days after the decision or order is signed to file a Motion for Rehearing with TCEQ. The motion must identify the findings of fact or conclusions of law that the party disagrees with and any evidentiary or legal rulings claimed to be erroneous. TCEQ must then grant or overrule the motion or extend the timeline for its decision. If TCEQ fails to act within 45 days, the Motion for Rehearing is automatically overruled, unless TCEQ has extended the

timeline for its decision. The appealing party has 30 days to file a petition for judicial review in state court.

## **SETTLEMENT OF A PERMIT CHALLENGE**

Early in the public participation process, it can be useful to contact the permit applicant (or its attorney) to see if the applicant is interested in discussing settlement. Sometimes an applicant is willing to agree to changes in the permit, such as reductions in pollution, better monitoring, or better pollution control, or changes to otherwise reduce the negative impacts of the permitted action on the surrounding community, in exchange for your agreement to withdraw your permit comments and request for a contested case hearing. If the parties do agree to settle, you should make sure you have a final, signed, and clearly written settlement agreement prior to withdrawing your comments and request for hearing.

## **CONCLUSION**

Environmental permits are one of the primary methods for controlling pollution. They establish pollution control requirements, operating requirements, specific limits on the amount of pollution a source can emit and require monitoring to determine compliance with these requirements. If you want to ensure that pollution from a nearby source is limited to the maximum extent possible, that a pollution source is not located in an area where it is unsafe, or that the source is required to track its emissions so you can know whether or not it is complying with the law, you should participate in the permitting process for that source.

If you are interested in participating in permitting decisions for a particular project or source, it is important to get on the notice list to receive notice of permitting actions, to timely comment and request a contested case hearing, and to identify in your comments those aspects of a permit or application that fail to meet applicable legal requirements.

## Chapter Two

### Public Participation in Enforcement

Environmental laws and permits intended to protect public health and the environment only work if they are properly enforced. While EPA, TCEQ, and some local governments have authority to enforce environmental requirements in Texas, the TCEQ is primarily responsible for enforcing Texas environmental laws and permits. The public can play an important role in assisting agency enforcement by documenting violations and filing environmental complaints. Complaints and documentation from nearby residents can help the local, state, or federal agencies identify environmental violations, and public involvement and pressure can encourage TCEQ and EPA to take more swift and meaningful enforcement action. Additionally, for certain violations, individuals can bring their own “citizen suit” enforcement actions in federal district court.

In addition to reporting potential environmental violations to TCEQ or EPA, as discussed below, you can report to your local government by calling 311 or, for situations that present a threat to health or safety, by calling 911.

#### Participating in TCEQ Enforcement Proceedings

##### Filing Environmental Complaints

If you believe that you observe what might be an environmental violation, you can file a complaint with TCEQ by phone at 1-888-777-3186 or electronically at <https://www.tceq.texas.gov/complaints/index.html>. It is a good idea to file a written complaint and to keep a copy. If a situation requires a quick response, however, you should also report it by phone. If you wish to file a complaint without providing any additional evidence, such as photos or video, then you may file a complaint anonymously, but TCEQ will be unable to follow-up with you regarding an anonymous complaint.

If you are willing to provide your contact information with your complaint, an agency investigator will contact you to discuss your complaint and any evidence you may have. You should keep a record of your complaints and communication with the TCEQ investigator including the date and content of the communication, the name of your investigator, and your assigned complaint number. Depending on the type of violations alleged, the investigator may conduct an on-site investigation at the facility, or may come to your home to take dust or water samples, or conduct an odor survey.



Once TCEQ finishes its investigation, you should be given written notification of the results and you may contact the investigator with any remaining questions. TCEQ should inform you about any further enforcement actions it takes. You can track the status of your complaint online at <https://www.tceq.texas.gov/complaints/waci.html>.

Be persistent. If violations are recurring, keep filing complaints. You might encourage your neighbors to file their own complaints with TCEQ about problematic violations, ask the press to write a story about the issue, or request that your elected officials make an inquiry with TCEQ about the violator.

## Documenting Environmental Violations

### Collecting your own evidence of violations

Where possible, it is good to provide the agency with documentation of the violations. You may want to take pictures or video; keep a diary of the dates, duration and severity of problems; and/or take air or water samples. TCEQ has developed a detailed list of procedures that should be followed when documenting alleged violations. Such procedures must be followed before your documentation can be used in a formal TCEQ enforcement action. Examples of these procedures include protocols for air and water sampling, requirements for documenting the “chain of custody” of your samples to show that they were handled properly, and requirements for photographic or video evidence. But even documentation that doesn’t meet TCEQ’s requirements can be useful in raising public, political, media and agency attention about environmental problems.

For more information about TCEQ’s procedures you can call 1-888-777-3186 or go to the agency’s website:

[http://www.tceq.texas.gov/compliance/complaints/protocols/evi\\_proto.html](http://www.tceq.texas.gov/compliance/complaints/protocols/evi_proto.html).

Be aware that if you submit a complaint with evidence, you may be asked by TCEQ to help with any agency enforcement action by signing an affidavit, testifying in court, and/or certifying that you have followed all agency protocols for collecting and handling physical evidence.

Useful ways of collecting evidence of environmental violations include the following:

- Taking photographs or video: take photos or video that show unauthorized discharges, or particularly dirty discharges or runoff from a facility; flaring; fires; chemicals being stored improperly, etc. You should keep records of the time, date and location from which each photo or video was taken.
- Keeping logs of pollution events or health impacts: record the date, time, location, and a description of pollution events at nearby facilities. Include any health effects that you have experienced during or immediately after the event and any impacts on your property or your use of your property.
- Taking samples of polluted water or of pollution deposited from the air.

- Using a pollution monitoring equipment. See <http://www2.epa.gov/air-research/air-sensor-toolbox-citizen-scientists> for information about low cost air monitors.

### Finding violations from TCEQ and EPA records

Many pollution sources are required to report permit violations and violations of other federal or state environmental requirements. You can obtain these reports through TCEQ's website or by requesting paper copies of compliance files. Information about reported violations and environmental background conditions can be found using the following resources:

- **Air Emissions Event Report Database:** this TCEQ database includes source-specific information about air emissions that exceed applicable limits. Sources must report any excess emissions event within 24 hours. These reports must identify the kind and amount of pollution released during the event. <http://www2.tceq.texas.gov/oce/eer/>
- **Air Operating Permit Deviation Reports and Annual Compliance Certifications:** these are paper reports that large sources of air pollution are required to file with the TCEQ. The deviation reports are filed every six months and include all possible instances of noncompliance with federal air pollution limits. The Annual Compliance Certifications are filed once a year and include the permittee's sworn statement that the report documents all instances of noncompliance with federal air pollution requirements. Deviation Reports and Annual Compliance Certifications can be obtained through TCEQ's file room or through an open records request.
- **Water Discharge Monitoring Reports:** These are reports that must be filed with TCEQ, generally monthly, by sources that discharge pollution into the water. You can request these reports to determine whether a source is complying with water pollution limits in its permit.
- **EPA Compliance and Enforcement History Online (ECHO) Database:** You can use EPA's ECHO database to search for facilities in your community and check whether they have been in compliance with environmental laws and their permitting requirements. <http://echo.epa.gov>.
- **EPA's Toxic Release Inventory (TRI):** you can use this database to find out about the amounts and kinds of toxic chemical releases reported by industrial and federal facilities. <http://www2.epa.gov/toxics-release-inventory-tri-program>.
- **EPA's Environmental Justice Screen (EJScreen):** this online tool allows you to map environmental and demographic information, including air toxics data, air pollution levels, and proximity to waste disposal and superfund sites. <https://www.epa.gov/ejscreen>.

### Participating in TCEQ Enforcement Decisions

There are limited formal opportunities for members of the public to participate when TCEQ takes its own enforcement actions. When TCEQ discovers a violation – either as a result of a

complaint, agency inspection, or compliance report – the agency may decide to issue a Notice of Violation (NOV). NOVs generally document a violation and set a deadline for the company to fix the problem. Most NOVs are resolved informally by the agency and the company without any penalties and without any public participation. For certain types of serious or continuing violations, TCEQ is required to issue a Notice of Enforcement (NOE). The NOE documents the violation and lets the company know it has been referred for more formal enforcement action. The company can appeal this enforcement referral and ask for a meeting with the agency. The public does not have an opportunity to participate in this process.

If TCEQ decides to proceed with enforcement, it can do so (1) through its own administrative process or (2) by referring the case to the Texas Office of the Attorney General for state civil enforcement or to the county or district attorney's office for criminal enforcement. Remedies can include monetary penalties, requirements for correcting and/or preventing recurrence of violations, permit revocation or suspension, or even jail time for some criminal violations.

#### **A. Administrative Enforcement Actions**

If TCEQ proceeds with administrative enforcement action, it will first contact the alleged violator. If the alleged violator agrees to settle and does not contest the violations, the agency will usually draft an Agreed Order. The Order describes the alleged violations and may include the steps needed to correct the violation and/or a requirement that the company pay monetary penalties. The monetary penalty amount is based on TCEQ's penalty policy, available at <http://www.tceq.texas.gov/publications/rg/rg-253.html>. The agency's "penalty calculation worksheet" will explain how TCEQ calculated any proposed penalty.

Notice of the proposed Agreed Order is published in the Texas Register with a 30-day period for public comment. After the comment period, the agreement is set on the agenda for one of the TCEQ Commissioner's Agenda meetings. Several days before the Agenda meeting, TCEQ staff posts the current negotiated enforcement agreements online at <http://www.tceq.texas.gov/agency/agendas/agenda.html>. Unless requested by the Commissioners, oral comments are not permitted at the Agenda meeting. After the Commissioners act, notice of the decision must be published in the Texas Register.

If an alleged violator does not agree to settle with the TCEQ, the agency normally drafts an Executive Director's Preliminary Report and Petition, which includes a description of the alleged violations, the statutes violated, the facts relied upon, and a recommendation for any corrective actions and penalties. The alleged violator then has 20 days to file an answer and an additional 30 days to request a contested case hearing in front of an Administrative Law Judge at SOAH.

There is no requirement to provide the public with notice that the case has moved to SOAH, but you can look for the enforcement matter in SOAH's docket of scheduled contested cases at <http://www.soah.state.tx.us/Docket/general.asp> or contact TCEQ to ask about status of an

enforcement action. You can search pending TCEQ enforcement actions at <http://www2.tceq.texas.gov/oce/penenfac/>.

If the facility you are concerned about is one with a wastewater discharge or underground injection permit issued by TCEQ, you may have standing to participate in the enforcement hearing yourself. However, the ALJ has discretion to decide whether to admit you as a party to the contested case hearing.

At the end of the contested enforcement case, the ALJ will issue a Proposal for Decision that includes proposed remedial or injunctive relief and one of the following: (1) a determination that a violation has occurred and a specific amount of penalties should be assessed, (2) a determination that a violation has occurred but no penalty should be assessed, or (3) a determination that no violation has occurred. The PFD is then sent to the TCEQ Chief Clerk's office and scheduled for a Commission meeting and final Commission action. You can search for issued Commission Orders at <http://www14.tceq.texas.gov/epic/CIO/>.

## **B. Enforcement by the Texas Attorney General**

Rather than pursuing a violation administratively, TCEQ may decide to refer the case to the Texas Attorney General's Office for a judicial enforcement action. The Attorney General can bring an environmental enforcement action in the Travis County District Court, in the county where the defendant resides, or in the county the violation occurred. The public can seek to intervene and become a party in such an enforcement case pursuant to the Texas Rules of Civil Procedure. Additionally, the Attorney General is required to offer an opportunity for public comments on any proposed order or agreement and must consider these comments as a potential basis for modifying the proposed settlement.

### **Violations that MUST be referred to the Attorney General's Office:**

Discharges into state waters or adjacent waters at a new point of discharge without authorization.

Violations of the Texas Water Code Chap. 26 or Texas Health and Safety Code Chapters 361 or 382 for which a person has received two or more finally issued administrative orders within two years at the same source.

Operation of a new solid waste facility without a permit.

Construction or operation of a facility at a new plant site without a permit required by Chapter 382 of the Health and Safety Code.

## Participating in EPA Enforcement Proceedings

While the TCEQ has been delegated the authority to administer and enforce many of the federal environmental program in Texas, EPA retains oversight and independent enforcement authority over federal programs. EPA can, therefore, enforce most environmental requirements in Texas. You can report suspected environmental violations to EPA at <https://www.epa.gov/enforcement/report-environmental-violations>. The EPA enforcement process is similar to TCEQ's and, likewise, often results in settlement agreements with companies for their environmental violations. As with TCEQ's enforcement process, there are limited opportunities for public participation in the EPA process.

If EPA documents an environmental violation, it can issue an informal oral or written warning to the company, or it can issue a more formal Notice of Violation.

In addition, for most environmental violations, EPA is authorized to:

- Issue compliance orders
- Assess administrative money penalties
- Bring suit in federal court, or
- Refer to the Attorney General's office for criminal prosecution.

If EPA pursues administrative enforcement action, the agency drafts an administrative complaint that details the alleged violations, proposes a specific penalty, and gives the alleged violator the opportunity to request a hearing. Usually these hearings are before a federal Administrative Law Judge (ALJ). After the hearing, the ALJ issues findings of fact and conclusions of law and issues an initial decision, which becomes final if it is not appealed within 45 days. Appeals from enforcement decisions are generally made to EPA's Environmental Appeals Board (EAB). A person against whom a penalty has been issued can seek review of the EAB decision in federal district court.

If EPA decides to pursue a civil court enforcement action, it must refer a "request for litigation" to the Department of Justice, which acts as EPA's lawyer in civil enforcement actions. If DOJ decides to file the enforcement action in federal district court, a member of the public could move to intervene in the case pursuant to the Federal Rules of Civil Procedure.

## Bringing Your Own Citizen Suit

While TCEQ and EPA are primarily responsible for enforcing environmental laws, most federal environmental statutes allow citizens to independently sue sources of pollution for violating permit limits and other requirements. These enforcement actions may be brought in federal court and are referred to as "citizen suits." If you are interested in filing a citizen suit, you

should plan on hiring a lawyer or finding a public interest group with access to lawyers to bring the suit on your behalf.

### **Standing to Sue**

The plaintiffs, or the parties bringing a citizen suit, can be a single affected person, a group of affected people, or an organization with affected members. It often simplifies the lawsuit and reduces costs to limit the number of plaintiffs in your citizen suit. Each person or organization who is a plaintiff must have “standing” to bring a citizen suit.

To demonstrate standing, an individual must show that:

- He or she has suffered a concrete injury that is actual and imminent (for example, “I used to swim in that river but now I can’t because it smells too bad”); and
- There is a connection between the violations alleged and the injuries complained of (for example, “Illegal discharges from the plant upstream include pollutants that are likely to cause the river to smell bad.”); and
- It is likely that the violations and injuries can be addressed by a favorable court decision (e.g., “An order prohibiting the discharges will eliminate the bad smell from the river.”)

If the citizen suit plaintiff is an organization, that organization must demonstrate standing by showing that: (1) at least one of its members would have standing to sue in his or her own right; (2) the interests the organization seeks to protect in the lawsuit are related to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

### **Providing Notice of the Intent to Sue**

Before filing a citizen suit, most federal environmental laws require the party bringing the lawsuit to send a notice of intent to sue to the violator, EPA, and sometimes the regulating state agency. Generally, the notice letter must be sent at least 60 to 90 days before filing a citizen suit, depending on which statute has been violated, and must specifically identify the alleged violations and the dates on which they occurred.

### **Determining what violations to allege in your suit**

The federal environmental statutes define which violations can be enforced through a citizen suit. Generally, federal and state environmental statutes and rules and the terms and conditions of environmental permits are enforceable through a citizen suit. In addition, several statutes allow suits to halt actions that endanger public health or welfare, even if those actions do not otherwise violate a statute, permit, or rule.

You cannot, however, bring a citizen suit for violations for which a state or the federal government is already taking “diligent” enforcement action. Under some statutes, the government must bring a civil or criminal enforcement action in court to preempt citizen suits addressing the same violation. Under other statutes, an administrative enforcement proceeding may be sufficient to preclude a citizen suit. A citizen suit is only barred, however, with respect to those violations for which the government has taken enforcement.

In addition, depending on the federal environmental statute in question, the violation may need to be ongoing, not a one-time violation, in order to be subject to a citizen suit. In other words, you may not be able to bring a citizen suit for past violations that are no longer occurring. For example, a one-time wastewater discharge in violation of a Clean Water Act permit limit may not be susceptible to a citizen suit enforcement action. By contrast, it is possible to bring a citizen suit under the Clean Air Act for wholly past violations, as long as those violations are likely to be repeated. Additionally, you cannot typically bring a citizen suit for violations that occurred more than five years prior to the suit.

While citizen suits may be brought to address a wide range of environmental violations, judges and juries may be unsympathetic and unwilling to impose sanctions for misconduct that does not result in significant harm. Before deciding to file a citizen suit, think carefully about whether the environmental violation you are addressing warrants the time, trouble, and expense of a lawsuit.

### **Proving the violations**

The plaintiff has the burden to prove that the violation(s) occurred. Evidence of violations may take the form of compliance reports filed by the company, sampling or monitoring data, expert testimony and/or photos and video. The facts must be documented in a way that is acceptable as evidence in court.

### **Citizen Suit Remedies**

Citizen suit remedies include monetary penalties and injunctions to stop the violations or prevent future similar violations. If a citizen suit is successful, monetary penalties assessed for violations generally go to the government, and not the plaintiff. You cannot recover for personal financial losses or individual health or property impacts. For certain violations, however, a portion of the penalties may go towards projects (“supplemental environmental projects”) that address the adverse impacts on a local community caused by the environmental violations. Such projects have in the past included funding mobile health clinics, purchasing community monitors, retrofitting diesel school buses to burn cleaner natural gas, purchasing endangered species habitat, and creating wetlands.

In addition, a successful plaintiff may recover litigation costs, including experts’ and attorneys’ fees. Note, however, that if a plaintiff loses a citizen suit, the court may also order the plaintiff

to pay for the opposing party's litigation costs. Courts rarely assess costs against plaintiffs in such suits, but if they do, these costs can be substantial.

While citizen suits are powerful tools for bringing environmental violators into compliance, the environmental laws are dense and complicated and the rules and procedures for citizen suits are full of pitfalls for the untrained. You will likely need the assistance of an attorney or other person familiar with these suits, as well as technical experts, to succeed. Citizen suits are not quick fixes; any lawsuit should be considered a long-term endeavor. It is hard to get to trial within a year, although settlements in citizen suits can frequently result in much quicker compliance than going to trial.

## **CONCLUSION**

Environmental permits and related laws cannot protect the environment or public health unless they are enforced. The public can help EPA and TCEQ effectively enforce environmental requirements by documenting environmental violations, bringing violations to the attention of TCEQ and EPA, neighbors, the media, and elected officials, and filing comments on proposed agency enforcement actions. In cases where EPA and TCEQ fail to address serious environmental violations, members of the public may be able to file a citizen suit in federal court to enforce federal environmental requirements.

## Chapter Three

### Public Participation in Rulemaking

Agencies adopt regulations, also referred to here as “rules,” to fill in the details and requirements of laws passed by Congress or state legislatures. Agency regulations are intended to clarify the law and provide greater detail about how the law works. The federal agency responsible for most environmental rulemaking is EPA; the Texas agency is TCEQ. Other agencies, however, such as U.S. Fish and Wildlife Service, Texas Parks and Wildlife, the Texas Railroad Commission, and some local governments, also have rules or ordinances affecting the environment. While this section refers specifically to TCEQ and EPA rulemakings, most state agency rulemaking procedures are very similar to TCEQ’s and most federal agency rulemaking procedures are very similar to EPA’s.

Before a state or federal rule becomes final, the agency responsible for the rule must publish the proposed language and provide the public with an opportunity to comment. In Texas, the process for proposing and adopting rules is described by the Texas Administrative Procedure Act. This process generally mirrors the federal procedure for rulemaking, as laid out in the federal Administrative Procedure Act.

Final state regulations are published in the Texas Administrative Code, available online at [http://texreg.sos.state.tx.us/public/readtac\\$ext.viewtac](http://texreg.sos.state.tx.us/public/readtac$ext.viewtac). Final federal rules are published in the Code of Federal Regulations, available online at <https://www.ecfr.gov/cgi-bin/ECFR?page=browse>.

When a rule is finally adopted, it is published in the Texas or Federal Register along with a narrative response to comments received on the proposed rule. These responses can be very helpful in understating a new or amended rule.

Members of the public may participate in the rulemaking process by petitioning an agency to adopt rules, by working to influence the early, informal process of rule development, and by filing formal comments in response to publication of proposed rules in the Texas Register or Federal Register. Finally, you can challenge an agency’s final adoption of rules in court if you believe those rules are illegal.

#### Participating in TCEQ Rulemaking

TCEQ adopts rules relating to both procedures and substantive requirements for various environmental programs in Texas. For example, TCEQ’s rules set out the procedures for applying for an environmental permit, as well as the substantive environmental requirements for obtaining such a permit. TCEQ’s rules also set limits on pollution and describe what kind of pollution monitoring companies are required to perform. TCEQ’s rules can, therefore, have a big impact on how much pollution is released to the environment.

TCEQ proposes rules in response to new Texas legislation, new federal requirements, petitions, or on its own initiative. TCEQ uses several advisory groups and stakeholder groups to help develop and implement rules. A list of these groups, their meeting schedules, and background documents can be found at <http://www.tceq.texas.gov/agency/advise/rulemaking.html>.

In addition, the TCEQ Executive Director's office is required to maintain a mailing list of people requesting advance notice of proposed commission rules. You can ask to be added to this list. When TCEQ sends notice of proposed rules to the Secretary of State's Office, notice is also mailed to the notice list. At the end of each year, TCEQ will contact persons on the list and notify them that, in order to remain on the list, they must submit a response asking to remain on the list.

The Texas Register is the official publication for proposed and final rules in Texas. The publication is available online through the Secretary of State's website, <http://www.sos.state.tx.us/texreg/>, or through the University of North Texas Libraries website, <http://texinfo.library.unt.edu/texasregister/>. However, it is often easier to find TCEQ-specific rules on TCEQ's website. The following links are particularly useful:

- General Information about Rules and Rulemaking: [http://www.tceq.texas.gov/rules/rules\\_rulemaking.html](http://www.tceq.texas.gov/rules/rules_rulemaking.html)
- Summary of Current Rulemaking Activity at TCEQ: <http://www.tceq.texas.gov/rules/whatsnew.html>
- Proposed Rules: <http://www.tceq.texas.gov/rules/prop.html>
- Adopted Rules: <http://www.tceq.texas.gov/rules/adopt.html>

### **Public Notice and Public Comment Periods**

Before a rule can take effect, TCEQ must provide public notice of the proposed rule and allow at least 30 days for public comment. The 30-day period begins on the date the proposed rule is published in the Texas Register. Although you can ask TCEQ for an extension of time to comment, this extension will not always be granted. The proposed rule, as published in the Texas Register, contains details about the rule, how to submit written comments, the deadline for comments, and how to obtain additional information on the rule.

Written comments on a proposed rule may be submitted by mail, fax, or online at <http://www1.tceq.texas.gov/rules/ecomments/>. During the public comment period, interested persons can also request a public hearing at which the public can give oral comments on the proposed rule (see <http://www.tceq.texas.gov/rules/hearings.html>).

### **Response to Comments and Adoption of the Rule**

When issuing a final rule, TCEQ must provide a "reasoned justification" for the rule that includes, among other things, a summary of and response to all public comments or proposals

received. If the final version of the rule differs from the proposed version, the text of the final rule is published in the Texas Register. Final rules become part of the Texas Administrative Code, which can be accessed online [http://texreg.sos.state.tx.us/public/readtac\\$ext.viewtac](http://texreg.sos.state.tx.us/public/readtac$ext.viewtac).

### **Judicial Review of Final Rules**

A person who is, or may be, affected by a final rule may challenge the adoption of the rule in state district court. Deadlines for filing appeals will depend on the basis for your challenge. A challenge alleging that TCEQ did not follow required procedures for adopting a rule (notice, comment, etc.) must be filed no later than two years after the effective date of the rule. If you want to challenge a rule it is best to do it sooner rather than later, because courts are reluctant to invalidate a rule once the regulated community begins making significant and costly changes to comply with the rule. Challenging agency rules is difficult because courts tend to defer to an agency's expertise unless the agency has acted irrationally or clearly erred in an interpretation of law.

### **Petitioning for New Rules**

Anyone can petition TCEQ to adopt a new rule, to amend a rule, or to revoke an existing rule. If TCEQ accepts the petition for rulemaking, the agency must go through the formal rulemaking process described in the Texas Administrative Procedure Act.

Petitions for rulemaking must be in writing and include: an explanation of the proposed rule, the text of the rule, a statement of the statutory or other authority for the rule, and an explanation of the injury or inequality that could result from the failure to adopt the proposed rule. If the rule proposal is an amendment to an existing rule, the petition must indicate the words to be added or deleted from the text of the current rule.

TCEQ then has 60 days to either deny the petition in writing or commence a rulemaking action responsive to the petition. If TCEQ does not accept a petition for rulemaking, it must deny the petition and give its reasons for denial. There is no clear time limit on the duration of a rulemaking action.

### **Participating in EPA Rulemaking<sup>4</sup>**

Congress has provided EPA with the authority to adopt rules filling in the standards and details for many environmental laws. See <http://www.epa.gov/lawsregs/basics.html>. In proposing and adopting most rules, EPA is required to follow the Federal Administrative Procedures Act. EPA can propose a rule in response to a specific Congressional requirement, a petition from an interested person, a recommendation for a government agency such as the Government Accountability Office, or a court decision. EPA may also simply decide a new rule is needed in an

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<sup>4</sup> These rulemaking procedures generally also apply to other federal agencies that adopt environmental rules, such as the U.S. Fish and Wildlife Service or the U.S. Army Corps of Engineers.

area over which it has discretion. EPA's rule must be within its regulatory authority to adopt, be consistent with the plain language of federal statutes, and reflect a reasonable interpretation of those laws.

The federal government provides several online tools for tracking planned and pending agency rulemakings. EPA's Regulatory Plan is published annually and describes the most important regulations EPA reasonably expects to issue in proposed or final form during the upcoming fiscal year. EPA's Semiannual Regulatory Agenda is published twice a year and describes a broader universe of regulatory activities under development or review. Included in the Agenda are regulations and certain major policy documents. You can access EPA's Agenda and Plan at <http://www.reginfo.gov/public/> or at <http://www.regulations.gov> .

#### **Regulatory Development and Retrospective Review Tracker (RegDaRRT):**

Reg DaRRT is a web tool created by the EPA to assist citizens interested in following the status of priority rulemakings (i.e., rulemakings determined to have higher environmental and societal impacts than other rules) and of retrospective reviews of existing regulations. You can visit Reg DaRRT online at: <http://yosemite.epa.gov/opei/RuleGate.nsf/>.

Sometimes, before EPA drafts a proposed rule, it will publish an Advanced Notice of Proposed Rulemaking (ANPR) in the Federal Register. An ANPR is used when EPA wants additional input or data before it actually drafts a rule proposal.

#### **Notice of Proposed Rules**

Once EPA develops a proposed regulation, it publishes a Notice of Proposed Rulemaking in Federal Register. The Federal Register is available online at <https://www.federalregister.gov/>. The notice will also be placed in a public docket created for the rulemaking. The docket is the file in which EPA places all materials related to the rulemaking, including hearing notices, studies, background materials and all public comments. In addition, the agency will normally include memos documenting any substantive phone conversations regarding the rules. The public docket for EPA rulemakings can be found at <http://www.regulations.gov>.

#### **Submitting Comments on Proposed Rules**

Once the proposed regulation is published, the public may submit comments. Comments periods vary, but are generally between 30 and 60 days. To submit comments to EPA by mail, follow the directions in the proposed rule. To submit comments online, visit <http://www.regulations.gov>. Further information on how to submit comments can be found online at <http://www.epa.gov/lawsregs/getinvolved.html>.

## Notice of Final Rule

After EPA receives comments on the proposed rule, the agency reviews comments and develops a final regulation. Like proposed regulations, final EPA regulations are published in the Federal Register. The final rule must include a preamble and the rule text. The preamble includes a response to comments and a statement regarding the purpose of the rule. Generally, rules cannot take effect prior to 30 days after publication in the Federal Register. The final rules will then be incorporated into the Code of Federal Regulations, available at <http://www.ecfr.gov/cgi-bin/ECFR?page=browse>.

## Judicial Review of Final Rules

In most cases, if you believe an EPA (or other federal agency) rule is contrary to the requirements of a statute, exceeds the agency's jurisdiction, was not adopted in compliance with required procedures, or is arbitrary and capricious, you can challenge that rule in federal court. You may also be able to intervene in a court challenge to an EPA rule that was filed by others.

Which court you file a rule challenge in depends on the statute under which the rule was adopted (e.g. Clean Air Act versus Clean Water Act) and on the type of rule. Often rules that apply nationally must be challenged in the Court of Appeals for the District of Columbia, while more regional rules can be challenged in the regional Court of Appeals.

## Petitioning for New Rules

Finally, you can petition EPA, or other federal agencies, to adopt, amend, or repeal rules. The EPA maintains a database of petitions for rulemaking that it has received at <https://www.epa.gov/aboutepa/petitions-rulemaking>.

## CONCLUSION

Agencies often establish pollution control requirements, as well as public participation requirements, through their rulemaking processes. By staying informed about agency rulemakings and commenting on those that affect your area, facilities near your community, or your ability to participate, you can have long term and wide-reaching impacts on both environmental quality and the ability of the public at large to have a say in the environmental requirements that may affect their health and well-being.

# Using Federal and State Laws to Obtain Public Environmental Information

## Introduction

The public has the right to obtain certain environmental documents from government agencies. Generally, federal and state laws make most documents held by government agencies publicly available, unless that document falls under a specific exemption from public disclosure provided by law, e.g., documents related to national security, trade secrets or internal agency memos. The public may often obtain documents from agencies through informal email requests, websites, and by visiting agency file rooms. If you are unable to obtain documents using these methods or the agency requests it, you may need to submit a formal information request to obtain the documents you want. Government agencies have no responsibility to create a document to provide you with information you want. They only have the responsibility to produce already existing documents.

## Freedom of Information Act (FOIA)

If you are seeking documents from a federal agency, such as the Environmental Protection Agency or the United States Army Corps of Engineers, your request will be subject to the Freedom of Information Act (FOIA). General information on using FOIA can be found on the government's website <http://www.foia.gov/index.html>. Additionally, the Reporters Committee for Freedom of the Press has published an excellent guide to using FOIA, which can be found online at <http://www.rcfp.org/federal-open-government-guide>.

## Filing a FOIA Request

If you know which documents you want and which agency has them, you may first try to obtain the documents by calling the public information office or file room at the agency involved and asking for the documents. It might be helpful to offer some explanation of why you want the documents but you are not required to give one. The agency may require that request be made in writing and only a written FOIA request — not an informal, oral request — will place the agency under a legal duty to respond by the FOIA deadline.

Each federal agency subject to FOIA has a designated FOIA Service Center and a Chief FOIA Officer responsible for managing information requests. For a list of agency FOIA contacts, visit <http://www.foia.gov/report-makerequest.html>. If you are unsure which federal agency or office has the records you want, send the same request to several of them. If you can identify the

regional agency office that is likely to have the document you want, be sure to “cc” the request you send to the Chief FOIA Officer to that regional office.

Agencies will accept a request by hand delivery, mail or e-mail. If you mail your request, address your request letter to the FOIA officer at the appropriate agency or subdivision and mark the outside of the envelope “FOIA Request.” Generally, a request letter should contain your name and the information you are requesting (with as much specificity as possible). You may also want to request that the agency inform you prior to responding to your request if fees are likely to exceed a certain amount. You can also request that, to the extent documents are in electronic form, they be produced to you electronically.

FOIA includes specific fee provisions for certain types of requestors: (1) commercial use requesters must pay fees for document search, duplication and review; (2) non-commercial requesters from educational or scientific institutions and representatives of the news media pay no search fees and receive 100 pages of free duplication; and (3) all other requesters receive two hours of search time and copies of 100 pages free.

In addition, FOIA provides for a reduction or waiver of any fees where “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” If you are requesting a fee waiver, include in your request a description of the requestor, the purpose of the request, and how you met the criteria for a reduction in fees or fee waiver.

In order to qualify for the public interest waiver, you must demonstrate that:

- The subject of the requested records concerns government operations and activities,
- The disclosure is likely to contribute to understanding of these operations or activities,
- Disclosure will likely result in public understanding of the subject,
- The contribution to public understanding of government operations or activities will be significant,
- The requester has a limited commercial interest in the disclosure, and
- The public interest in disclosure is greater than the requester’s commercial interest.

For detailed information about FOIA, how to file a request, and how to request a fee waiver, see visit [www.ifoia.org](http://www.ifoia.org).

### **Agency Response to a Request**

Once a formal request is filed, the agency is required to respond within 20 working days by either producing the documents, showing that they are covered by one of the FOIA exemptions and do not have to be produced, or claiming an extra 10 days for processing a request that requires review of voluminous records. In addition, agencies are allowed additional time to clarify the request and for fee calculation, and courts can grant agencies additional time for

“unusual and exceptional circumstances.” If you have an urgent need for the information, which usually requires a need relating to health or safety, you may qualify for “expedited processing.” An agency may charge you the reasonable costs of providing the documents, unless you are entitled to reduced fees or fee waivers as discussed above.

FOIA allows the government to withhold certain specific types of information, such as:

- Information relating to national defense,
- Information about agency personnel matters,
- Trade secrets or certain privileged or confidential financial information,
- Certain pre-decisional, communications within or between agencies that would be privileged in a civil court case,
- Certain personal data kept in government files (such as medical data) where the release would be an invasion of privacy,
- Certain records compiled for law enforcement purposes,
- Some documents related to the regulation of financial institutions, and
- Information that would reveal certain oil well data.

### **Appealing a Request Denial**

If an agency refuses to disclose all or part of the information you have requested, delays the response, or charges an unreasonably large fee, you may file an administrative appeal with the agency’s FOIA Appeals Officer. If your administrative appeal is denied or if the agency fails to respond to the appeal within 20 working days, you can then file a lawsuit in a federal court. If you “substantially prevail” in court, a judge will order the agency to release the records and may award you attorney’s fees and court costs.

**For more information about FOIA requests, please visit:**

- <http://www.foia.gov/index.html>
- <http://nsarchive.gwu.edu/nsa/foia.html>

### **Texas Public Information Act (PIA)**

If you are seeking documents from a state agency, such as the TCEQ, your request will be subject to the Public Information Act (PIA), chapter 552 of the Texas Government Code. General PIA information can be found on the Texas Attorney General Open Government website: <https://texasattorneygeneral.gov/og/open-government>. A Public Information Handbook is also available at [https://texasattorneygeneral.gov/files/og/publicinfo\\_hb.pdf](https://texasattorneygeneral.gov/files/og/publicinfo_hb.pdf).

## Filing a Public Information Act Request

Public information includes all information, regardless of format, that is *collected, assembled, or maintained by or for* a governmental body for official business. Like FOIA, the Texas Public Information Act applies when a person submits a request for public records to a governmental body, and only records that are already in existence are required to be made available.

As with federal agencies, you may be able to obtain information informally by calling the TCEQ or visiting the file room. If you are unable to obtain the information you want informally, you can submit a written request under the PIA specifying the type of information you are interested in receiving. Open records request can be made by hand delivery, mail, or e-mail. Instructions for filing an open records request with TCEQ by fax, mail, or online are available at <https://www.tceq.texas.gov/agency/data/records-services/reqinfo.html>.

## Costs

Texas agencies can generally charge you for the costs of compiling and copying documents responsive to your request. The Texas Government Code §552.267 provides, however, that “[a] A governmental body shall provide a copy of public information without charge or at a reduced charge if the governmental body determines that waiver or reduction of the charge is in the public interest because providing the copy of the information primarily benefits the general public.”

You have a right to have the agency inform you ahead of time if the costs of your request will exceed \$40. You must respond to the agency’s cost estimate within 10 days indicating you wish to proceed with your request.

## Agency Response to Request

Texas governmental bodies must respond to open records requests “promptly.” If the governmental body takes longer than 10 days to process your request, the public information officer must notify you of the delay and set a date and time when the records will be available for your use. A governmental body is prohibited from asking you about your reasons for wanting the requested information, but if your request is too broad for the governmental body to process, the governmental body may ask you to clarify your request or to narrow the scope of your request.

As with FOIA, some types of information are exempted from the Public Information Act. If the information you request falls under one of the exceptions of the PIA, then the governmental body may refuse to release the information to you. In this case, the governmental body will also seek an open records decision from the Attorney General to determine whether the governmental body can withhold the information from you. The governmental body must seek an attorney general decision within 10 business days of receiving your request, and must

provide reasons for withholding your requested information. You should receive a copy of the governmental body's letter to the attorney general.

### **Appealing a Request Denial**

If an Attorney General's open records decision allows a governmental body to withhold all or part of the information you requested, you may appeal the decision to state court. If you have question about a decision you have received, you may seek additional assistance from the Open Government Hotline at (877) 673-6839.

## ATTACHMENT A PERMITTING ISSUE CHARTS

**Note:** The charts below are designed to assist you in bringing relevant issues to TCEQ's attention during the permitting process. A chart exists for air permits, hazardous/industrial waste permits, wastewater permits, and injection well permits. Each table has two columns. The left column provides the relevant regulatory or statutory authority for the related issues listed to its right. Each issue derives its legal significance from the statute or regulatory rule listed to the left. When referring issues to TCEQ, be sure to include the issue's corresponding statute or rule.

Charts are included for permits for:

- Release of Air Pollutants
- Industrial Solid Waste and Hazardous Waste Management Facilities
- Class I Injection Wells
- Discharge of Waste Waters or Pollutants
- Issues Particular to Domestic Wastewater Discharges
- Issues Particular to Industrial Wastewater Discharges from Electric Generating Facilities
- Issues Particular to Land Disposal or Irrigation of Waste Waters

## Potential Issues for Public Comments and for Formal Hearings on Permit Application Involving

### RELEASE OF AIR POLLUTANTS

Key Provisions of Statutes or Rules	Issues That TCEQ Has to or May Consider <i>(Use if True or Likely to be True)</i>
Texas Health & Safety Code (THSC) §382.002, 382.0518, 382.0519, 382.05195, 382.05196, 382.052, 382.055, 382.065	<p><b>The application fails to protect the public’s health, welfare and property and the environment.</b> For example:</p> <ol style="list-style-type: none"> <li>1) the proposed facility is to be located within 3000 feet of a school;</li> <li>2) the emissions from the proposed facility will have adverse effects on the public’s health, property and welfare and the environment;</li> <li>3) the proposed facility fails to comply with the requisite emission control technology (e.g., BACT, GACT, MACT, and/or LAER); and/or</li> <li>4) the proposed facility is or will be located in an area that violates applicable location and distance restrictions.</li> </ol>
THSC §382.002, 382.0515, 382.0518, 382.05196	<p><b>The application is not adequate.</b> For example:</p> <ol style="list-style-type: none"> <li>1) it has insufficient plans and specifications necessary to determine compliance with applicable federal and state air control statutes, rules, and regulations;</li> <li>2) emissions modeling is not adequate to determine probable emissions<sup>5</sup> and cumulative effects;</li> <li>3) it is not the correct application or authorization for the proposed facility;</li> <li>4) nonattainment review provisions apply to this facility; and/or</li> <li>5) the proposed facility and/or modifications are subject to the requirements of New Source Performance Standards not addressed in the application.</li> </ol>

<sup>5</sup> This can occur for such reasons as having used an outdated model or having mis-located emission points or having left out a few emission points. The most common error, however, is using emission factors for which there are thin or very subjective data. Do not accept an AP-42 emission factor simply because EPA sponsors AP-42; some of these factors are good and some are bad and none are actually intended for this (modeling) purpose.

Key Provisions of Statutes or Rules	Issues That TCEQ Has to or May Consider <i>(Use if True or Likely to be True)</i>
THSC §382.002, 382.0518, 382.0519, 382.05195, 382.05196, 382.052, 382.055, 382.065	<p><b>The draft permit fails to protect the public’s health, welfare and property and the environment.</b> For example:</p> <ol style="list-style-type: none"> <li>1) the proposed facility is to be located within 3000 feet of a school;</li> <li>2) the emissions from the proposed facility will have adverse effects on the public’s health, property and welfare and the environment;</li> <li>3) the proposed facility fails to comply with the requisite emission control technology (e.g., BACT, GACT, MACT, and/or LAER);</li> <li>4) existing or proposed emission controls are not adequate;</li> <li>5) the off-site emissions exceed applicable limits; and/or</li> <li>5) the proposed facility is or will be located in an area that violates applicable location and distance restrictions.</li> </ol>
THSC §382.002, 382.0514, 382.05195  30 Texas Administrative Code (TAC) §101.201, 101.211	<p><b>The draft permit is not adequate.</b> For example:</p> <ol style="list-style-type: none"> <li>1) It does not require sampling, monitoring or reporting requirements that are adequate to make the permit terms enforceable as a practical matter;</li> <li>2) It does not have enforceable terms – e.g., terms are vague or might fairly be read as “descriptive” rather than as mandatory; and/or</li> <li>3) It does not realistically address startup and shut down emissions and their control.</li> </ol>
THSC §382.0516, 382.031, 382.05191, 382.05195, 382.05197, 382.056, 382.058	<p><b>Failure to comply with applicable notice requirements.</b> For example:</p> <ol style="list-style-type: none"> <li>1) notice was not sent to the proper state senator and representative;</li> <li>2) notice was not provided in the requisite alternative language;</li> <li>3) requisite signs were not posted;</li> <li>4) publication did not occur in a newspaper of general circulation in the community in which the proposed facility is or will be located; and/or</li> <li>5) a copy of the application or draft permit was not available at the public place provided in the published notice.</li> </ol>

<b>Key Provisions of Statutes or Rules</b>	<b>Issues That TCEQ Has to or May Consider</b> <i>(Use if True or Likely to be True)</i>
THSC §382.002, 382.0518; 382.055	<b>The applicant has a poor compliance history</b> , which justifies: 1) the denial of the application; 2) the need for strong and enforceable permit provisions; and/or 3) the minimum time period allowed for expiration and renewal requirements.
30 TAC §101.3	<b>The proposed facility will circumvent applicable regulations.</b>
30 TAC §101.4	<b>The proposed facility will cause nuisance conditions.</b>

## Potential Issues for Public Comments and for Formal Hearings on Permit Application Involving

### INDUSTRIAL SOLID WASTE AND HAZARDOUS WASTE MANAGEMENT FACILITIES

Key Provisions of Statutes or Rules	Issues That TCEQ Has to or May Consider <i>(Use if True or Likely to be True)</i>
<p>Tex. Health &amp; Safety Code (THSC) § 361.002 &amp; Subchapter C; and 30 Tex. Administrative Code (TAC) Subchapter A, §335.4</p>	<p><b>The issuance of the permit would be inconsistent with state policies</b> including the legislative and regulatory directives that no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste in such a manner so as to cause:</p> <ol style="list-style-type: none"> <li>1) the discharge or imminent threat of discharge of industrial solid waste or municipal solid waste into or adjacent to waters in the state;</li> <li>2) the creation and maintenance of a nuisance; and/or</li> <li>3) the endangerment of public health and welfare.</li> </ol>
<p>THSC §361.064; 30 TAC §§ 335.8, 335.12, &amp; 335.15; 30 TAC Subchapter B, including § 335.44; and 30 TAC §§ 335.152, 335.174</p>	<p><b>The application is inadequate</b> because it does not contain sufficient information:</p> <ol style="list-style-type: none"> <li>1) describing the site: all springs, faults, wells, soils, etc. were not identified by the applicant;</li> <li>2) describing the facility and all facility components;</li> <li>3) identifying wastes and taking and maintaining records of wastes generated, stored, processed, or disposed of, with quantities and sources;</li> <li>4) describing methods and types of operations used for acceptance of wastes and in the storage, processing or disposal of wastes;</li> <li>5) defining engineering plans and specifications and other documentation necessary to demonstrate that all components of the facility design, construction, and operation conform to standards established by the commission; and/or</li> <li>6) describing the adequate closure plans and procedures</li> </ol>
<p>30 TAC Subchapter F, §§ 335.152, 335.156 - .164 &amp; 335.173</p>	<p><b>The groundwater protection and monitoring provisions are inadequate</b> because:</p> <ol style="list-style-type: none"> <li>1) the number and location of groundwater monitoring wells are inadequate to:             <ol style="list-style-type: none"> <li>(a) get samples from the upper aquifer that represent the quality of background water unaffected by contamination,</li> <li>(b) represent the quality of groundwater, and/or</li> <li>(c) allow for detection of contamination by waste or waste constituents;</li> </ol> </li> <li>2) the monitoring plan does not include consistent sampling and analysis procedures; and/or</li> <li>3) the sampling and methods will not accurately measure contaminants in the groundwater samples.</li> </ol>

Key Provisions of Statutes or Rules	Issues That TCEQ Has to or May Consider (Use if True or Likely to be True)
30 TAC Subchapter A, §335.7; 30 TAC Subchapter F, §335.167, 335.174, 335.178, 335.179, 335.183	<p><b>The financial assurance is inadequate because:</b></p> <ol style="list-style-type: none"> <li>1) the cost estimate for closure is insufficient as it does not represent the actual cost of an independent third party closure of the facility;</li> <li>2) the applicant does not propose to have the types or amounts of financial assurance to fund the emergency response personnel and equipment necessary to manage a reasonable worst-case emergency condition associated with the operation of the facility; and/or</li> <li>3) financial assurance is not sufficient to cover the costs of post closure needs.</li> </ol>
30 TAC Subchapter F, §335.180	<p><b>The location of the proposed facility is incompatible with local land use in the area.</b></p>
30 TAC Subchapter F, §335.151, 335.152 & 335.183	<p><b>The contingency and other operating plans are inadequate because:</b></p> <ol style="list-style-type: none"> <li>1) the plans are not detailed plans, but just promises to comply or plans to have plans;</li> <li>2) the plans do not include enforceable requirements; and/or</li> <li>3) the plans do not cover all contingencies or reasonable worse case scenarios.</li> </ol>
30 TAC Subchapter F, §§335.173, 335.177	<p><b>The design is inadequate because</b> the proposed [explain design] will not prevent wastes from leaving the facility during the active life of the facility (for example, material of construction are not appropriate).</p>
30 TAC Subchapter G	<p><b>If a landfill, the landfill site is not appropriate</b> because:</p> <ol style="list-style-type: none"> <li>1) the site does not minimize the possibility of contamination of surface water and groundwater;</li> <li>2) the site is located in the 100-year floodplain;</li> <li>3) the site is located in wetlands;</li> <li>4) the site is located on the recharge zone of a sole-source aquifer;</li> <li>5) the site is located in an area overlying a regional aquifer;</li> <li>6) the soil is not suitable;</li> <li>7) the site is located within 1,000 feet of an established residence, church, school, day care center, surface water body used for a public drinking water supply, or a dedicated public park;</li> <li>8) the site is located in the 100-year floodplain of a perennial stream;</li> <li>9) the site is located in an area of direct drainage within one mile of a lake at its maximum conservation pool level and the lake is used to supply public drinking water;</li> <li>10) the site is in an area of active geological processes;</li> <li>11) the site is located in the critical habitat of an endangered species of plant or</li> </ol>

Key Provisions of Statutes or Rules	Issues That TCEQ Has to or May Consider <i>(Use if True or Likely to be True)</i>
30 TAC Subchapter G, §335.205	<p>animal;  12) the site is located on a barrier island or peninsula; and/or  13) the site is located within 30 feet of the upthrow side or 50 feet of the downthrow side of the actual or inferred surface expression of a fault that has reasonably been shown to have caused displacement of shallow Quaternary sediments or of man-made structures.</p> <p><b>The permit should be denied because</b> there is a practical, economic, and feasible alternative that is reasonably available to manage the types and classes of waste.</p>

## Potential Issues for Public Comments and for Formal Hearings on Permit Application Involving

### Class 1 Injection Wells

Key Provisions of Statutes or Rules	Issues That TCEQ Has to or May Consider. <i>(Use if True or Likely to be True)</i>
Tex. Water Code §§ 27.051 (a)(1), (4) & (6) and 27.073; and 30 Tex. Administrative Code (TAC) §§ 331.120, 331.121, & 331.142	<b>Wells are not in the public interest because the applicant:</b> 1) has a poor compliance history; 2) has not shown a need for the wells or that other practical, economic, and feasible alternatives do not exist; 3) lacks sufficient public liability insurance; 4) lacks adequate financial responsibility, including adequate bonds or financial assurance; 5) has a weak financial condition and may abandon the site; 6) has not designed or proposed operations that will protect the public health, and/or the public welfare; 7) has not evaluated the effects of the well on local conditions; and/or 8) has not minimized the burdens imposed on local law enforcement, emergency medical or fire-fighting personnel.
Tex. Water Code §§ 27.051 (a)(3) & (c); and 30 TAC §§ 331.5, .42, .44 & .121	<b>Ground &amp; surface water will not be adequately monitored or protected from pollution:</b> For example, monitoring of nearby groundwater should be required.
Tex. Water Code §§ 27.015(a)(2); and 30 TAC §§ 331.121	<b>Existing property or mineral rights will be impaired:</b> Explain how, for example: 1) trespass by waste moving under your property, and/or 2) higher costs of drilling through waste to get to your oil and gas below.
Tex. Water Code §§ 27.051 (a)(1) & (c); and 30 TAC §§ 331.4, 331.43, 331.44, & 331.121	<b>Inadequate design &amp; materials for well, casing, tubing, cement, casing, &amp; other materials of construction and monitoring:</b> For example, materials are not shown to be compatible and able to resist damage from all wastes. Monitoring will not detect releases from and pressure in the tubing, annular space, formation, & other formations. There is inadequate information on the well(s) including inadequate logging of well and inadequate proposals for periodic testing of wells.
Tex. Water Code § 27.051 (a)(1) & (c); and 30 TAC §§ 331.5, 331.47 & 331.121 and Chapter 350.	<b>Inadequate written plans for contingencies/emergency/spills/fires:</b> For example, the application does not provide detailed plans with specified training for key employees in identifying, inspecting, recording, reporting, and responding to spills, fires and other such events.

Key Provisions of Statutes or Rules	Issues That TCEQ Has to or May Consider. <i>(Use if True or Likely to be True)</i>
Tex. Water Code §§ 27.051 (a)(1) & (c); and 30 TAC §§ 331.44, 331.45, & 331.121	<b>Inadequate testing &amp; treatment of wastes prior to injection:</b> For example, an inadequate waste analysis plan to test for compatibility of wastes with the materials of construction, the injection formation, and other wastes that have been injected. Also, failing to check that manifest accurately describes incoming waste.
Tex. Water Code §§ 27.051 (a)(1) & (c); and 30 TAC §§ 331.7(d), 331.17, & 331.121	<b>Inadequate site and design for the well and the related pre-injection facilities at the surface:</b> For example, inadequate contingency plan for spills of pump, lines and tanks.

## Potential Issues for Public Comments and for Formal Hearings on Permit Application Involving

### Discharge of Waste Waters or Pollutants

Key Provisions of Statutes or Rules	General Water Quality Issues That TCEQ Has to or May Consider <i>(Use if True or Likely to be True)</i>
Tex. Water Code (TWC) § 26.0282	<p><b>No need for the facility:</b></p> <ol style="list-style-type: none"> <li>1) One or more other centralized wastewater treatment facilities has the capacity to handle the wastewater involved or could be expanded to treat the quantity of wastewater involved;</li> <li>2) The wastewater treatment needs of the proposed service area can be adequately served by on-site sewage facilities (such as septic tanks);</li> <li>3) The current and anticipated growth in the service area does not demonstrate a need for the proposed facility.</li> </ol>
TWC § 26.0281	<p><b>Applicant's history of poor compliance at this or other facilities requires:</b></p> <ol style="list-style-type: none"> <li>1) denial of the application,</li> <li>2) close scrutiny of the information in the application, and/or</li> <li>3) additional conditions and terms in the proposed permit to minimize the likelihood of future violations.</li> </ol>
TWC §§ 26.027, 26.028, 26.034, 26.037, 26.121	<p><b>The application is inadequate:</b> For example, it is incomplete, inaccurate, and/or fails to include all necessary and required information, for example:</p> <ol style="list-style-type: none"> <li>1) it does not include a complete list of all names and addresses of persons affected by the proposed application;</li> <li>2) it does not accurately depict the location of the outfall or the property boundaries of the facility;</li> <li>3) it is not consistent or compatible with the applicable water quality management plan; and/or</li> <li>4) it does not contain adequate facility designs and specifications.</li> </ol>
TWC § 26.028	<p><b>There was not proper notice of application:</b> For example: there was not</p> <ol style="list-style-type: none"> <li>1) mailed notice to all persons on the agencies mailing list;</li> <li>2) proper or timely newspaper notice;</li> <li>3) notice in Spanish;</li> <li>4) accurate or sufficient information in the notice; and/or</li> <li>5) notice published and/or posted in accordance with the law.</li> </ol>

Key Provisions of Statutes or Rules	General Water Quality Issues That TCEQ Has to or May Consider <i>(Use if True or Likely to be True)</i>
30 Tex. Administrative Code (TAC) § 307.4(b)	<p><b>The facility will have unacceptable impacts.</b></p> <p>The limitations in the permit fail to prevent adverse impacts such as:</p> <ol style="list-style-type: none"> <li>1) Concentrations of taste and odor producing substances that would interfere with production of potable water, impart an unpalatable flavor to food fish, including shellfish, or result in offensive odors arising from the waters;</li> <li>2) Floating debris and suspended solids that could harm aquatic wildlife, or impact other uses of the receiving waters;</li> <li>3) Settleable solids that could alter the flow characteristics of the receiving stream or result in the filling of the receiving waters;</li> <li>4) Changes from normal conditions of clarity and color in the receiving waters;</li> <li>5) Persistent foaming or frothing;</li> <li>6) Oil, grease or other related residue that produces a film on the top, bottom, or banks of the receiving water body.</li> </ol>
30 TAC §§ 307.4(d), 307.6(c)(4), 307.7(b) & 309.3(g)(2)	<p><b>The permitted discharge will be harmful or toxic.</b></p> <p>The limitations in the permit fail to ensure that the receiving waters will not be harmful to people as the result of ingestion, consumption of aquatic organisms, or contact with the skin by bacteria, pathogens or toxic constituents in the discharge.</p> <p>The limitations in the permit fail to ensure that the receiving waters will not be toxic to terrestrial or aquatic wildlife due to chlorine levels or other constituents in the discharge.</p>
30 TAC § 307.4(e)	<p><b>The permit authorizes the discharge of nutrients in excessive quantities.</b></p> <p>The permit fails to limit the discharge of nutrients in a manner that will prevent the excess growth of aquatic vegetation that would interfere with an existing or attainable use of the receiving water.</p>
30 TAC §§307.4(d) & § 308.81, incorporating 40 Code of Federal Regulations § 125	<p><b>The permit authorizes the discharge of wastewater at an excessive temperature.</b></p> <p>The temperature of the discharge would interfere with the existing and attainable uses of the receiving waters.</p> <p>The elevated temperature of the discharged wastewater does not assure the protection and propagation of a balanced indigenous population of fish, shellfish and wildlife in and on the water body receiving the discharge.</p>
30 TAC § 307.4(g)	<p><b>The permitted discharge will have unacceptably adverse impacts on salinity.</b></p> <p>The permit fails to ensure that the salinity of the receiving waters will not be impacted in a way that would harm existing or designated uses of those waters. When the receiving water is an estuary, the limitations in the permit fail to prevent the alteration of salinity gradients in the receiving estuary in a manner that would adversely impact those receiving waters.</p>

Key Provisions of Statutes or Rules	General Water Quality Issues That TCEQ Has to or May Consider <i>(Use if True or Likely to be True)</i>
30 TAC §§307.4(h) & 307.7(b)(3)(A)	<b>The proposed discharge would result in unacceptable reductions in levels of dissolved oxygen.</b> The permit fails to ensure that dissolved oxygen levels in the receiving waters will be sufficient to support existing and attainable uses of those waters.
30 TAC § 307.4(m) & 307.7(b)(4)(B)	<b>The permitted discharge will alter the pH of the receiving waters in a manner that would interfere with existing and attainable uses of those waters.</b>
30 TAC § 307.5	<b>The permitted discharge violates the Texas' Anti-degradation requirements.</b> 1) The permitted discharge will interfere with existing or attainable uses of the receiving waters, such as recreation, public water supply, or aquatic life use. 2) For any perennial water, water quality would be lowered without a showing that this lowering is necessary for important economic or social development.
30 TAC §§ 309.12 & 319.27.	<b>Construction and operation of the proposed facility would result in the contamination of groundwater.</b>
TWC §§ 26.027, 26.0285, 26.030, 26.041 & 26.121	<b>The proposed permit must be denied because:</b> 1) it does not comply with agency rules; 2) it would allow the contamination of ground and surface water; 3) it does not require use of a sufficiently advanced treatment technology; or 4) it does not provide for a discharge to a watercourse.
TWC §§ 26.0285, 26.029 & 26.042	<b>The proposed permit is inadequate:</b> For example, it fails to provide in clear and enforceable terms adequate provisions for: 1) the character of the discharge, 2) quantities of the discharge, 307.7(b) 3) the location of the discharge point(s), and/or 4) adequate monitoring and reporting requirements, including sufficient frequency and type of monitoring to detect violations or adverse impacts as the conditions of discharge and conditions in the receiving waters change from time to time and for upsets and by passes of sewage.
30 TAC § 307.8(e)	<b>Stormwater discharges from the facility will impair existing or attainable uses:</b> For example, stormwater controls are not based on implementation of the necessary treatment technologies and best management practices.
30 TAC § 307.4(c)	<b>The facility will discharge unacceptable quantities of radiation.</b> The limitations in the permit do not prevent the discharge of radioactive materials in excess quantities.

### Issues Particular to Domestic Wastewater Discharges

30 TAC § 309.13 & 309.14	<b>The proposed site is unsuitable because:</b> 1) A plant unit is to be located in the floodplain without adequate protection; 2) A plant unit is located closer than 500 feet to a public water well or 250 feet to a private water well;
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	<ul style="list-style-type: none"> <li>3) The facility includes an impoundment located over a recognized aquifer without an adequate liner or impermeable soil; and/or</li> <li>4) Wastewater basins are located closer than 500 feet to the property line, or other wastewater treatment units are located closer than 150 feet to a property line, and this will cause odor problems.</li> </ul>
30 TAC § 309.12	<p>The proposed site does not minimize the potential for surface or groundwater contamination in consideration of:</p> <ul style="list-style-type: none"> <li>1) Geologic conditions such as erosion, submergence, subsidence, faulting, karst formations, flooding or river bank cutting;</li> <li>2) Groundwater conditions such as groundwater quality, length of wastewater flow from the treatment plant to the discharge point, and aquifer recharge or discharge conditions;</li> <li>3) Soil conditions such as the hydraulic conductivity of the soil and separation distance from the facility to the aquifer; and/or</li> <li>4) Climate conditions at the site.</li> </ul>

### Issues Particular to Industrial Wastewater Discharges from Electric Generation Facilities

30 TAC § 308.91, incorporating 40 CFR §125.80 – 125.89	The location, design, construction and capacity of the cooling water intake structures for the facility do not reflect the best technology available for minimizing the adverse environmental impact of the facility.
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### Issues Particular to Land Disposal or Irrigation of Waste Waters

TWC § 26.0282	<b>Reasonable alternatives to land disposal exist.</b>
TWC §§ 26.027, 26.028, 26.034, 26.037, 26.121	<p><b>The application is inadequate:</b> For example, it is incomplete, inaccurate, and/or fails to include all necessary and required information, such as:</p> <ul style="list-style-type: none"> <li>1) a description of the soils, ground waters, surface waters, or the location of wells, faults, fractures, sink holes, wetlands, etc.; and/or</li> <li>2) adequate facility designs and specifications.</li> </ul>
TWC §§ 26.0285, 26.029, 26.042	<p><b>The proposed permit is inadequate:</b> For example, it fails to provide in clear and enforceable terms:</p> <ul style="list-style-type: none"> <li>1) limits specifically keyed to characteristics for treatment and disposal</li> <li>2) rates of application of the waters; including the quality, quantity, flow, location of disposal and conditions for disposal; and/or</li> <li>3) adequate monitoring and reporting requirements, including sufficient frequency and type of monitoring to detect violations, etc.</li> </ul>